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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CAROUSEL BAKERY, Plaintiff and Appellant, v. HARTFORD FIRE INSURANCE COMPANY, Defendant and Respondent.	E030461 (Super.Ct.No. RIC308016) OPINION

APPEAL from the Superior Court of Riverside County. Erik Michael Kaiser, Judge. Affirmed.

insuringlaw.com and John A. Belcher for Plaintiff and Appellant.

Ropers, Majeski, Kohn & Bentley and Susan H. Handelman for Defendant and Respondent.

Plaintiff Carousel Bakery (Carousel) appeals from a judgment entered after a jury found in favor of defendant Hartford Fire Insurance Company (Hartford) in Carousel's action for breach of the covenant of good faith and fair dealing. Carousel claims that the trial court erred by exclusion from trial evidence of the amounts that it had expended for attorney's fees in order to obtain the insurance benefits to which it was entitled. It also claims that the trial court was required to award it attorney's fees according to the holding in *Brandt v. Superior Court* (1985) 37 Cal.3d 813 (*Brandt*). We disagree and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Dawnyel and Richard Wise (the Wises) owned and operated Carousel, a wholesale commercial bakery. In February 1997, an explosion and fire occurred at the bakery resulting in damage to the building and its contents.

Hartford had issued an insurance policy to the Wises doing business as Carousel for the period October 1, 1996, to October 1, 1997. The policy covered losses in three categories: business personal property, the building and business income and extra expense. In April 1997, the business personal property portion of the claim was settled when Hartford paid Carousel $96,559.85. Hartford issued a check for the building claim in September 1997 in the amount of $19,807.82. By the end of November 1997, Hartford had paid Carousel $236,367.67 on its fire claim, $120,000 of which was for the business income and extra expense portion of the claim.[1] At that point it contended that

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[1] At oral argument, counsel for Carousel repeatedly and vehemently insisted that a report authored by the Kinsel Accountancy Corporation proved that Hartford knew in November 1997 that it owed Carousel an additional $62,283 on its business income and extra expense claim, at one point going so far as to state that he would stake his appeal on the report. He has gambled much on a losing hand. The Kinsel report concluded that Carousel had a total loss of business income of $112,823. The record demonstrates that

[footnote continued on next page]

it had paid the entire amount of the loss that Carousel had substantiated and advised Carousel that if it disagreed with the amount of loss, an appraisal should be undertaken pursuant to the policy terms. Carousel argued that Hartford owed it $145,000 more, but Hartford believed that no additional amounts had been substantiated.

Carousel filed a complaint for damages on February 6, 1998, alleging causes of action for breach of the insurance contract, bad faith and negligence in the performance of a statutory duty. In essence, Carousel alleged that Hartford had failed to conduct a reasonable investigation into its losses and had failed to reimburse it within a reasonable time, resulting in Carousel's incurring substantial losses and expending attorney's fees to obtain insurance proceeds. In response, Hartford filed a petition to compel the appraisal procedure required by the insurance policy. Over Carousel's objection the trial court issued an order compelling the procedure. On January 4, 1999, the appraisal panel concluded that Hartford owed Carousel a total of $189,363 on the disputed business income and extra expense portion of the claim. Hartford promptly issued a check to Carousel for $69,363, the balance due ($189,363 less $120,000 previously paid) on that remaining portion of the total fire claim. Carousel did not dispute the award. By January 12, 1999, Hartford paid a total of $305,730.67 on Carousel's claim.

[footnote continued from previous page]
as of the end of November 1997 Hartford had paid Carousel $120,000 on its business income claim. Kinsel's $62,823 figure was based on its failure to credit Hartford with $70,000 in additional payments. The Kinsel report actually establishes that as of November 1997 Hartford had overpaid the claim by $7,177.

Carousel then filed a first amended complaint alleging causes of action for breach of contract, bad faith, negligence, fraud and deceit, violation of the unfair competition act, negligent misrepresentation, and intentional and negligent infliction of emotional distress. In addition to the previous damages, Carousel asserted that Hartford's conduct had resulted in the eventual loss of the business to foreclosure. After Hartford's demurrer was sustained, Carousel again amended its complaint to allege causes of action for breach of contract and tortious breach of the implied covenant of good faith and fair dealing. Prior to trial, the court granted Hartford's motion for summary adjudication of the breach of contract claim.

On August 30, 1999, trial commenced on the sole remaining cause of action for breach of the implied covenant of good faith and fair dealing. During trial, the court granted Hartford's motion for nonsuit as to punitive damages. On September 24, 1999, the jury returned a verdict in favor of Hartford. While the jury found that Hartford did breach the covenant of good faith and fair dealing, it also found that the breach was not a substantial factor in causing damage to Carousel.

Carousel filed a notice of intent and motion for a new trial. Thereafter, the trial court issued a judgment in favor of Hartford. The following day Carousel filed a claim for attorney's fees pursuant to the holding in *Brandt*. The trial court heard both of Carousel's motions on October 29, 1999, and denied them.

Carousel then filed a notice of appeal. The appeal was dismissed by this court on a determination that the judgment was not a final appealable judgment since it did not contain any discussion regarding the adjudication of Carousel's motion for *Brandt* fees.

Prior to the issuance of the remittitur, Carousel served Hartford with a new motion for *Brandt* fees. Hartford filed opposition, but later learned that the moving papers were never filed with the court. Carousel filed its motion with the trial court on December 12, 2000, and Hartford refiled its opposition. On January 9, 2001, prior to the hearing on its first post-appeal motion, Carousel filed yet another motion for *Brandt* fees, which Hartford also opposed. The record contains no direct ruling on Carousel's motions. However, it can be inferred that they were denied by the trial court's indication that the October 7, 1999, judgment could be amended to include the order of October 29, 1999, denying Carousel's original request for *Brandt* fees.

After Carousel filed additional unsuccessful motions, an amended final judgment that included the trial court's denial of the original posttrial motions for a new trial and for *Brandt* fees was entered on August 28, 2001. This appeal followed.

DISCUSSION

A. *Brandt Fees*

Carousel challenges the trial court's denial of its request for attorney's fees according to *Brandt*, *supra*, 37 Cal.3d 813, and also claims that the trial court erred by failing to allow the jury to determine the *Brandt* fees award. We will address the second of these assertions first.

In *Brandt*, the Supreme Court held that attorney's fees reasonably incurred to compel payment of insurance policy benefits are recoverable as an element of damages in an action for breach of the implied covenant of good faith and fair dealing. (*Brandt*, *supra*, 37 Cal.3d at p. 815.) It reasoned that those "attorney's fees are an economic loss -- damages -- proximately caused by the tort. [Citation.]" (*Id*. at p. 817.) Carousel claims that absent a stipulation to the contrary, the jury must determine any award of *Brandt* fees (*id*. at pp. 819-820), and that there was no such stipulation in this case. The record belies that assertion.

In its trial brief, Hartford asserted that the parties had agreed that any claim for *Brandt* fees would be determined by the court after trial. The record also shows that while the parties were arguing their motions in limine, counsel for Hartford represented to the court that the parties had stipulated that any award of *Brandt* fees would be determined by the court after a judgment against Hartford, if any. Counsel for Carousel did not challenge these representations. Later, when arguing jury instructions, counsel for Hartford again told the court that the parties had agreed that *Brandt* fees would be determined by the court after judgment. Again, there was no challenge to the representation. Even later, counsel for Carousel suggested that it might be appropriate for evidence of attorney's fees, which would also support of an award of *Brandt* fees, to be presented with the rest of the evidence. "[I]t very well may be that the appropriate thing may be in this case is rather than bifurcate and roll the Brandt fees to phase two, your Honor has the discretion to roll them into phase one." This statement implies that counsel knew the *Brandt* fees issue would be heard separately. Even more telling is counsel's later statement that "if your Honor prefers, as I generally do, to do the Brandt second, in front of your Honor, I'm happy to do that." Thus, counsel specifically agreed that he was happy to have the trial court decide the issue of *Brandt* fees after the trial. Carousel is therefore precluded, by the doctrines of invited error and implied waiver, from claiming that it did not agree to the trial court's determining *Brandt* fees after the trial, or that the trial court erred in not giving the issue to the jury. (*Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 403; *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002.)

Carousel also claims that the trial court erred when it failed to award Carousel attorney's fees as permitted in *Brandt*. It asserts that when an insurance carrier is found to have breached the covenant of good faith and fair dealing, the court lacks discretion to refuse to award *Brandt* fees. (*Campbell v. Cal-Gard Surety Services, Inc*. (1998) 62 Cal.App.4th 563, 572 (*Campbell*).) Despite Carousel's argument to the contrary, *Campbell* is distinguishable from this case in that there the jury found that the insurer had breached the covenant of good faith and fair dealing and that the breach had caused damages. (*Id*. at pp. 569, 572.) In refusing to award *Brandt* fees, the trial court in *Campbell* determined, ignoring the finding of the jury, that there had been no breach of the covenant by the insurer. (*Id*. at p. 572.) Its ruling was overturned because it had no authority to make factual findings different from those made by the jury. (*Ibid*.)

The problem in this case is that while the jury found that Hartford did breach the covenant of good faith and fair dealing, it also found that the breach had not caused any damage to Carousel. In order to prove a cause of action for breach of the implied covenant of good faith and fair dealing, a plaintiff must show the existence of a duty, a breach of that duty and resulting damages. (2 Cal. Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar Aug. 2002 update) § 24.25, p. 901; *Continental Ins. Co. v. Superior Court* (1995) 37 Cal.App.4th 69, 86-87 [economic loss is essential element of bad faith claim]; see also *Aas v. Superior Court* (2000) 24 Cal.4th 627, 646, and *Crum v. City of Stockton* (1979) 96 Cal.App.3d 519, 522, fn. 3 [damages are essential element of tort cause of action].) Because Carousel failed to establish an essential element of its cause of action, it cannot claim to have prevailed on that cause of action. (*Childers v. Edwards* (1996) 48 Cal.App.4th 1544, 1549-1551.) Having failed to prevail on its cause of action for breach of the implied covenant of good faith and fair dealing, Carousel is not entitled to an award of *Brandt* fees.

The jury instruction suggested by the Supreme Court in *Brandt* lends support to this analysis. It states, in part, "'If you find (1) that the plaintiff is entitled *to recover* on his cause of action for breach of the implied covenant of good faith and fair dealing . . . .'" (*Brandt*, *supra*, 37 Cal.3d at p. 820, italics added.) Thus, the Supreme Court has implied that a plaintiff is entitled to *Brandt* fees only if a jury has found that the breach has caused some recoverable damage.

Carousel argues that it was precluded from introducing evidence of the amount of attorney's fees it incurred and therefore was prevented from demonstrating that Hartford's bad faith conduct did cause economic harm, in the form of attorney's fees. For reasons stated in section B of this opinion, this argument is not persuasive. Carousel was not forbidden to introduce evidence of attorney's fees and never argued to the trial court that it was necessary for it to do so in order to prevail on its cause of action for breach of the implied covenant of good faith and fair dealing.

Finally, even if we accepted Carousel's argument that the jury's finding that Hartford breached the implied covenant was sufficient for an award of *Brandt* fees, the state of the record makes such an award impossible. The special verdict is vague in that there is no indication what Hartford conduct the jury found to be unreasonable, nor is there any indication which portion of the insurance benefits the jury felt was wrongfully delayed. For example, there is sufficient evidence, had it been credited, to support a jury finding that Hartford's delay in confirming building coverage was unreasonable. The jury could also reasonably have concluded that the delay in paying the business income and extra expense claim was not unreasonable. The trial court has no way of determining what benefits were wrongfully delayed and therefore could not determine whether any attorney's fees were incurred in obtaining those benefits or what the proper amount of attorney's fees would be.

B. *Evidence of Attorney's Fees*

Carousel also challenges the trial court's purported exclusion of evidence related to the cost of attorney's fees it incurred to obtain payment from Hartford. It claims that had it been allowed to put on evidence that it had incurred substantial attorney's fees, the jury would have found both that Hartford's bad faith had caused it damage and that it had suffered some financial loss sufficient to support an award of emotional distress damages. Carousel's argument fails for the simple reason that the trial court did not prevent it from introducing evidence of attorney's fees to the jury.

During a discussion between the trial court and Hartford's counsel regarding jury instructions the court stated both that "[a]ttorney's fees are not a damage issue in this case" and that "[the jury is] not going to get any evidence on attorney's fees." At that time counsel for Carousel made no attempt to challenge the ruling. Later, pursuant to Carousel's query, the trial court confirmed that it had ruled that it did not want evidence of attorney's fees introduced. Carousel then argued that the issue of fees could be relevant and necessary depending on the evidence introduced and tactics undertaken by Hartford. The trial court responded that it would wait to see what the evidence would be before allowing testimony regarding attorney's fees expenses. Again counsel for Carousel argued that the issue of attorney's fees "may very well become relevant" depending on how the case developed. He also stated "I am happy to come in for a sidebar or formal offer of proof" to which the trial court responded, "[w]e won't mention attorney's fees unless we take it up outside the presence of the jury first."

Clearly, the trial court did not preclude counsel from introducing evidence of attorney's fees. It merely required that counsel explain why such evidence would be relevant and necessary prior to introducing it to the jury. Counsel for Carousel never attempted to convince the trial court that evidence of attorney's fees was either relevant or necessary. Certainly there is no indication in the record that Carousel informed the trial court that exclusion of attorney's fees evidence would prevent it from presenting its theory of the case, as it repeatedly claims in its briefs on appeal. Nor is there evidence that Carousel argued that proof of fees and costs would have constituted some evidence of economic harm in support of its bad faith and/or emotional distress claims. Carousel points to no such arguments, nor have we found any indication of them in our review of the record. The trial court cannot be faulted for failing to recognize the relevance and necessity of evidence when no argument was ever presented to it. (See *Nave v. Taggart* (1995) 34 Cal.App.4th 1173, 1177, citing *Sommer v. Martin* (1921) 55 Cal.App. 603, 610.) Failure to make an offer of proof precludes consideration on appeal of an alleged erroneous exclusion of evidence. (Evid. Code, § 354; *In re Mark C.* (1992) 7 Cal.App.4th 433, 444.) Carousel has not demonstrated that it is entitled to the relief it seeks.

DISPOSITION

The judgment is affirmed. Defendant to recover its costs on appeal.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

WARD
J.